

STATE OF MICHIGAN
COURT OF APPEALS

E. T. MACKENZIE CO.,

Plaintiff/Counter-Defendant/Cross-
Plaintiff/Cross-Defendant-
Appellant/Cross-Appellee,

v

RBS CONSTRUCTION, INC. a/k/a RBS
COMPANIES, INC. and KBB CONSTRUCTION,
INC.,

Defendants,

and

LANSING CLASSIC LIVING, L.L.C.,

Defendant/Counter-
Defendant/Cross-Defendant,

and

INDEPENDENT BANK WEST MICHIGAN,

Defendant/Counter-
Plaintiff/Counter-Defendant/Cross-
Plaintiff/Third-Party Plaintiff-
Appellee/Cross-Appellant,

v

KEBS, INC., SPARTAN IRRIGATION, INC.,
AMERI-CONSTRUCTION & CONCRETE, INC.,
TREES, INC., and MPC CASH-WAY LUMBER,
CO.,

Third-Party Defendants/Third-Party
Cross-Plaintiffs/Third-Party
Counter-Plaintiffs-
Appellants/Cross-Appellees,

and

UNPUBLISHED
December 13, 2011

No. 297406
Clinton Circuit Court
LC No. 06-10088-CH

G & B SUPPLY CO., HARRIS HOMES
CARPENTRY, INC., MCGUIRE
MECHANICAL, INC., THOMAS H. MALLORY,
PARAGON CONSTRUCTION CO., LTD., VANS
EXCAVATING, LTD., KENNETH F. DANTER,
WILLIAM E. HOLLAND, III, CHRISTENSEN'S
PLANT CENTER, INC., GUNNER PLUMBING,
INC., STREAMLINE ENTERPRISES, INC.,
TODD FISHER a/k/a TF & KC PAINTING, INC.,
TOTAL OUTDOOR SERVICES, INC.,
MCPHERSON BUILDERS, INC., and E.W.
KITCHENS, INC.,

Third-Party Defendants,
and

THOMPSON-MCCULLY ASPHALT PAVING,
L.L.C. a/k/a MICHIGAN PAVING &
MATERIALS CO. d/b/a SPARTAN ASPHALT
PAVING CO.,

Third-Party Defendant/Third-Party
Counter-Plaintiff/Third-Party
Cross-Plaintiff-Appellee.

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Various subcontractors, including E. T. MacKenzie Company, KEBS, Inc., Spartan Irrigation, Inc., Ameri-Construction & Concrete, Inc., Trees, Inc., and MPC Cashway Lumber Company, appeal a series of orders resulting in a judgment in favor of Independent Bank West Michigan regarding the priority of Independent Bank's mortgage over the subcontractors' construction liens and adjustment of the amounts of the subcontractors liens in this case brought pursuant to the Construction Lien Act (CLA).¹ We affirm.

I. Background

Lansing Classic Living, L.L.C. purchased property to develop a condominium project. The purchase price was obtained in part through a \$990,000 loan made by Independent Bank that was secured by a mortgage recorded on October 28, 2004. The parties concur that the first

¹ MCL 570.1101, *et seq.*

physical improvement to the property occurred on January 24, 2005. In March 2005, Independent Bank approved an increase of the loan in the amount of \$4,000,000, which included the original \$990,000 and \$3.01 million of “new” money. Construction on the project was halted due to the failure of the general contractor to remit timely payments, resulting in the subcontractors filing claims of lien against the property for varying amounts due in accordance with their contracts.

The litigation initiated in this matter primarily focused on determining the priority of Independent Bank’s mortgage and the subcontractors’ liens. The subcontractors argued that Independent Bank’s 2005 note and mortgage extinguished the 2004 mortgage and that, because the 2005 mortgage and note were executed after the first physical improvement to the property was rendered, Independent Bank’s mortgage and note were lower in priority than the subcontractors’ liens. Relying on the language of the 2004 mortgage, the trial court determined that the \$4,000,000 loan in 2005 constituted a future advance contemplated by the 2004 mortgage and that the entire \$4,000,000 was secured by the 2004 mortgage.

The subcontractors also challenged whether Independent Bank had complied with the requirements of the CLA for the various draws to receive priority status.² While not admitting to any failure to abide by the provisions of the CLA, Independent Bank argued that even with the elimination of all the disputed draws there remained over \$2 million in uncontested draws that would receive priority over the subcontractors’ liens, in addition to the initial \$990,000 loan. The trial court concluded that partial summary disposition was appropriate “on the basis of undisputed waivers of lien,” and ordered that the 2004 mortgage had “priority in the amounts of \$990,000 and \$2,650,481.77 over all construction liens and notices of interest recorded against the property.”

In turn, Independent Bank sought to reduce the amounts of the subcontractors’ liens claiming that certain liens included inappropriate amounts for interest, attorney fees, lost profits, and retainage. The trial court rejected the subcontractors’ claims for prefilings interest, attorney fees, lost profits, and retainage amounts, making proportional reductions in the various liens, after finding that such costs were not contemplated within the CLA and the absence of any provision for such damages in the parties’ respective contracts. The trial court ruled that Independent Bank had priority in the amounts of \$990,000 and \$2,650,481.77 over all construction liens and notices of interest. The property was eventually sold at a sheriff’s sale, with Independent Bank the successful bidder at \$1,760,000. The trial court entered a final order

² MCL 570.1101, *et seq.*

discharging all construction liens on the property and terminating any alleged rights to foreclose the discharged liens on March 16, 2010.

II. Lien Priority

A mortgage constitutes “mere security for the debt or liability secured by it, the debt or liability is the principal and the mortgage but an incident or accessory.”³ As a result, “payment, release, or anything which extinguishes the debt, extinguishes the mortgage.”⁴

“[T]he necessary result is that the mortgage instrument, without any debt, liability or obligation secured by it, can have no present legal effect as a mortgage or an incumbrance upon the land. It is but a shadow without a substance, an incident without a principle; and it can make no difference in the result whether there has once been a debt or liability which has been satisfied, or whether the debt or liability to be secured has not yet been created. . . .”⁵

The holder of a mortgage has a statutory obligation to discharge it upon payment or other satisfaction.⁶

While the parties do not disagree on these basic legal precepts, they dispute whether Independent Bank’s 2004 note was paid and the 2004 mortgage was extinguished. Specifically, the subcontractors assert that the execution of the 2005 note and mortgage automatically extinguished the 2004 mortgage. In response, Independent Bank argues that the unambiguous language of the 2004 mortgage and case law supports the trial court’s conclusion that the 2004 mortgage was not discharged and should receive priority.

“In interpreting a contract, [this Court’s] obligation is to determine the intent of the contracting parties.”⁷ “[A]n unambiguous contractual provision is reflective of the parties’ intent as a matter of law.”⁸ “[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or

³ *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942).

⁴ *Id.*

⁵ *Id.* at 717-718, quoting *Ladue v Detroit & Milwaukee R Co*, 13 Mich 380, 397 (1865).

⁶ MCL 565.41(1).

⁷ *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

⁸ *Id.*

nugatory.”⁹ “[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court.”¹⁰

The 2004 mortgage provided in relevant part:

FUTURE ADVANCES. Specifically, without limitation, this Mortgage secures, in addition to the amounts specified in the Note, all future amounts Lender in its discretion may loan to Grantor, together with all interest thereon.

* * *

Indebtedness. The word “Indebtedness” means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor’s obligations or expenses incurred by Lender to enforce Grantor’s obligations under this Mortgage, together with interest on such amounts as provided in this Mortgage. Specifically, without limitation, Indebtedness includes the future advances set forth in the Future Advances provision of this Mortgage, together with all interest thereon.

* * *

Note. The word “Note” means the promissory note dated October 27, 2004, in the original principal amount of \$990,000.00 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancing of, consolidations of, and substitutions for the promissory note or agreement. . . .

* * *

Related Documents. The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

Because this language is clear and unambiguous, there can be no reasonable dispute that the \$4,000,000 loan in March 2005 constituted a future amount provided by Independent Bank under the 2004 mortgage agreement.

⁹ *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (citation omitted).

¹⁰ *Michigan Nat’l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998).

Michigan law has long permitted mortgages to cover future advances.¹¹ Further, “Michigan case law has held that acceptance of a renewal note is not regarded as payment of a preexisting note or obligation, in the absence of a novation or express agreement to the contrary.”¹² Under the unambiguous terms of the 2004 mortgage, the subsequent \$4,000,000 loan was a future amount loaned. Because the note that represented the underlying obligations of the 2004 mortgage included all renewals and consolidations, an underlying debt remained and the 2004 mortgage was not discharged by the 2005 loan.

The subcontractors fail to cite case law in support of their contention that the existence of a second mortgage that is secured by the same debt as the first mortgage necessarily results in the discharge of the first mortgage. “[T]his Court will not search for authority to support a party’s position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal.”¹³ We further reject this argument as this Court has previously held that multiple mortgages secured by the same debt were not only proper, but could be enforced individually.¹⁴ Specifically, this Court found that separate foreclosures on individual mortgages were permissible because “[e]ach mortgage instrument constituted a separate and distinct contract, capable of independent enforcement.”¹⁵ This Court also held, “[T]wo or more mortgages or separate properties to secure the same debt may be foreclosed successively until the debt is satisfied.”¹⁶ Because there is no prohibition on having multiple mortgages secured by the same debt, the existence of the 2005 mortgage did not automatically serve to discharge the 2004 mortgage.

Based on the unambiguous language of the 2004 mortgage, the trial court properly concluded that the mortgage was not discharged by the subsequent loan of additional monies in 2005 and that the 2004 mortgage had priority over the subcontractors’ construction liens. This finding renders moot the additional contentions raised by the subcontractors regarding the priority of their construction liens under the CLA¹⁷ and Independent Bank’s assertion that MacKenzie’s lien should be rendered void because of bad faith in its filing.

III. Factual Findings

Although the subcontractors argue that the trial court improperly made findings of fact in determining that the execution of the 2005 note and mortgage were “one of the future advances

¹¹ See *Riess v Old Kent Bank*, 253 Mich 557, 563; 235 NW 252 (1931).

¹² See *Thorp Fin Corp of Wisc v Ken Hodgins & Sons*, 73 Mich App 428, 431; 251 NW2d 614 (1977).

¹³ *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

¹⁴ *Mich Nat’l Bank v Martin*, 19 Mich App 458; 172 NW2d 920 (1969).

¹⁵ *Id.* at 462.

¹⁶ *Id.*, quoting 59 CJS, Mortgages, § 489, p 773:

¹⁷ MCL 570.1103(1); MCL 570.1119(3).

contemplated by the original mortgage,” the record demonstrates that the trial court specifically rejected Independent Bank’s arguments relating to extrinsic evidence and made its decision solely on the language of the 2004 mortgage. Because interpretation of an unambiguous contract is a question of law¹⁸, the trial court did not err in determining the intent of the parties based only on the contractual language.

The subcontractors also contend that the trial court made the improper factual determination that the reason for executing the 2005 mortgage was “to change the interest rate” despite a lack of supporting evidence. While there was evidence in the lower court record that the interest rate changed, the existence of this evidence is irrelevant. The trial court did not indicate as a factual finding that a change in the interest rate was the reason for the execution of the 2005 mortgage. The trial court merely explained that there are legitimate business reasons to execute a new mortgage rather than to modify an existing mortgage. The trial court was not making findings of fact regarding why the parties executed the 2005 mortgage; it was simply suggesting that there are logical reasons to execute a new mortgage without intending to discharge an earlier mortgage.

IV. Disbursement Requirements

The parties concur that for the 2004 mortgage to have priority over the construction liens, the various disbursements must comply with provisions of the CLA.¹⁹ Specifically:

A mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act. The priority of the mortgage shall exist as to all obligations secured by the mortgage except for indebtedness arising out of advances made subsequent to the first actual physical improvement. *An advance made pursuant to the mortgage, but subsequent to the first actual physical improvement shall have priority over a construction lien if, for that advance, the mortgagee has received a contractor’s sworn statement as provided in section 110, has made disbursements pursuant to the contractor’s sworn statement, and has received waivers of lien from the contractor and all subcontractors, laborers, and suppliers who have provided notices of furnishing.* The construction lien of any lien claimant not set forth on the sworn statement upon which an advance was made shall be subordinate to the lien of the mortgage, including the advance, unless prior to the advance the lien claimant has provided the designee with a notice of furnishing if required by section 109 or has recorded a claim of lien. Any advance made after a notice of furnishing has been provided or has been excused as provided in sections 108, 108a, and 109 or a claim of lien has been recorded shall be subordinate to the construction lien of that lien claimant unless prior to the advance the mortgagee has received from that lien claimant either a

¹⁸ *Michigan Nat’l Bank*, 228 Mich App at 714.

¹⁹ MCL 570.1119(4).

full unconditional waiver of lien or a partial unconditional waiver of lien for the full amount due the lien claimant as of the date through which the lien is waived as shown on the lien waiver and the date through which the lien is waived as shown on the partial unconditional waiver is within 30 days prior to the advance.²⁰

The subcontractors argue that the trial court erred because certain disbursements by Independent Bank did not comply with this provision. Initially, and consistent with the statutory language, the trial court ruled that the 2004 mortgage was to have priority with regard to the \$990,000 that was distributed before any work was performed on the property. In addition, Independent Bank acknowledged it had disbursed approximately \$6,000,000 after the first improvement on the property. Recognizing that the subcontractors took issue with certain disbursements and despite its belief that all of the advances were proper, Independent Bank argued that it relied only on the amounts disbursed consistent with sworn statements by the general contractor of \$2,650,481.77, as required by statute, to establish its priority. Based on “the undisputed waivers of lien,” the trial court entered an order finding that the 2004 mortgage had priority over the construction liens in the amount of \$3,240,481.77, which comprised the original \$990,000 disbursement and an additional \$2,650,481.77 in uncontested disbursements. The subcontractors fail to acknowledge that these uncontested waivers form the basis of the trial court’s ruling and, instead, focus on draws that were not included by Independent Bank in the total amount claimed for priority. Although Independent Bank conceded that a significant proportion of the draws were not entitled to priority status, it argued that the over \$2 million in uncontested draws should receive priority. The subcontractors’ argument is disingenuous as they attempt to focus on draws that the trial court already disallowed and to which Independent Bank conceded priority. Because the subcontractors have failed to dispute the uncontested draws that form the basis of the trial court’s ruling, ““this Court . . . need not even consider granting . . . the relief they seek.””²¹

To the extent that the subcontractors argue that Independent Bank’s failure to comply with specific provisions of the CLA²² should have resulted in the loss of priority of all \$6,000,000 in disbursements, this argument is contrary to the plain language of the statute, which determines priority for each separate advance:

An advance made pursuant to the mortgage, but subsequent to the first actual physical improvement shall have priority over a construction lien if, for that advance, the mortgagee has received a contractor’s sworn statement as provided in section 110, has made disbursements pursuant to the contractor’s sworn statement, and has received waivers of lien from the contractor and all

²⁰ *Id.* (emphasis added.)

²¹ *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004), quoting *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997).

²² MCL 570.1119(4).

subcontractors, laborers, and suppliers who have provided notices of furnishing. .
.²³

The trial court properly concluded that the construction liens had priority over some, but not all, of the disbursements and that the 2004 mortgage received priority status with regard to \$3,240,481.77 of the disbursements because these monies were either disbursed before the first physical improvement to the property (\$990,000) or were uncontested (\$2,650,481.77) in the lower court.

V. Additional Damages

Because we have determined that the trial court properly granted priority status to Independent Bank's mortgage over the subcontractors' construction liens in the amount of \$3,240,481.77, the remaining issues pertaining to the propriety of excluding certain costs and fees from the subcontractors' liens are rendered moot based on the discharge of these liens following the foreclosure sale of the property. "An issue is moot and should not be reached if a court can no longer fashion a remedy."²⁴

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

²³ *Id.* (emphasis added).

²⁴ *Eller v Metro Contracting*, 261 Mich App 569, 571; 683 NW2d 242 (2004).